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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA :  
and UNITED STATES :  
DEPARTMENT OF AGRICULTURE, :  
Petitioners, :  
v. : No. 00-276  
UNITED FOODS, INC. :  
- - - - -x

Washington, D.C.  
Tuesday, April 17, 2001

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:10 a.m.

APPEARANCES:

BARBARA McDOWELL, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.;  
on behalf of the Petitioner.  
LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on  
behalf of the Respondent.

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CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning on No. 00-276, the United States and the Department of Agriculture v. United Foods, Inc.

Ms. McDowell.

ORAL ARGUMENT OF BARBARA McDOWELL

ON BEHALF OF THE PETITIONER

MS. McDOWELL: Mr. Chief Justice, and may it please the Court:

The assessments imposed under the Mushroom Promotion, Research, and Consumer Information Act do not abridge the freedom of speech of any mushroom producer. No producer is restrained by the Act from communicating any message to any audience, no producer is compelled to speak, and no producer is compelled to fund the expression of others' political or ideological views. Mushroom producers are simply required to contribute to the costs of a program of commercial speech and other activities designed to further the economic interests of their own industry.

QUESTION: Not in their view?

MS. McDOWELL: Not entirely, Your Honor, no, but Congress is entitled in this sort of economic program to make the determination that the interests of the industry

1 as a whole would benefit from such a program.

2 QUESTION: Well, you speak of the economic  
3 program. What is the economic program other than the  
4 program requiring contributions to this advertising  
5 scheme?

6 MS. McDOWELL: Well, the program is not limited  
7 to advertising, Justice Souter. As the title of the  
8 statute suggests, it's promotion, research, and consumer  
9 education, so the programs authorized by the Mushroom  
10 Council can and in some instances do include more than  
11 advertising.

12 QUESTION: But I take it it's your position that  
13 if it were solely confined to advertising, it would be  
14 constitutional nonetheless.

15 MS. McDOWELL: That's correct, Justice Kennedy,  
16 as long as Congress has a legitimate interest in  
17 strengthening the market for a particular agricultural  
18 commodity, Congress is entitled under Wileman to enact  
19 this sort of program and impose it upon an industry.

20 QUESTION: Is this commercial speech that is  
21 within the First Amendment for some purposes?

22 MS. McDOWELL: Yes, it is, commercial speech.  
23 Certainly if an individual producer was engaging in the  
24 same sort of message, the Government would be constrained  
25 by the commercial speech doctrine from restricting the

1 speech.

2 QUESTION: So your position is that in some  
3 instances industries or persons can be compelled to  
4 contribute to commercial speech when there is no other  
5 program that's connected with it?

6 MS. McDOWELL: That's correct. Of course, such  
7 programs are subject to other constitutional constraints,  
8 such as rational basis considerations and --

9 QUESTION: And you say it can't cover  
10 ideological speech. What is ideological speech? I mean,  
11 suppose I am a member of the People for the Ethical  
12 Treatment of Mushrooms, and I think that mushrooms should  
13 not be eaten at all, can I be compelled to take part in  
14 this advertising?

15 MS. McDOWELL: Well, then presumably you  
16 wouldn't be a mushroom producer and you wouldn't be  
17 covered by this statute.

18 QUESTION: Oh, no, I produce them to make them  
19 happy. I just don't harvest them.

20 MS. McDOWELL: Well, I still think in those  
21 circumstances you would be outside the statute because you  
22 wouldn't be selling them for consumption. On the other  
23 hand --

24 QUESTION: Would it be ideological? I mean what  
25 is this ideological line that you're drawing? I mean,

1 what if I feel adamantly about a free market and this  
2 advertising is slanting the market? I feel passionately  
3 that as an ideological matter a free market is a good  
4 thing.

5 MS. McDOWELL: It's a line that the Court drew  
6 in Wileman Brothers itself contrasting those sorts of  
7 objections of fruit producers with the kinds of objections  
8 that were asserted in cases like Abood and Keller,  
9 objections to, for example, a nuclear freeze initiative  
10 that the California bar had supported or contributions to  
11 political candidates in the Abood context.

12 QUESTION: So nuclear freezes and political  
13 candidates are ideological.

14 MS. McDOWELL: Those would clearly fall on that  
15 side of the line, whereas --

16 QUESTION: Free economy is not?

17 MS. McDOWELL: Pardon me?

18 QUESTION: Free economy is not?

19 MS. McDOWELL: Well, certainly respondent and  
20 others are free, notwithstanding the Mushroom Act to  
21 express their own views about the benefits of a free  
22 economy.

23 QUESTION: Ms. McDowell, I take it you're making  
24 a point that in that respect it's no different from  
25 Wileman, but you've gotten away from a point that you

1 started on when Justice Kennedy put a question to you.  
2 You of course are trying to make this as much like Wileman  
3 as you can. Is there anything in this program, as there  
4 was in that one, other than the advertising? You said the  
5 statute authorizes research and something else you  
6 mentioned, but in fact is anything going on other than the  
7 advertising?

8 MS. McDOWELL: Yes, in fact, Justice Ginsburg,  
9 other programs are going on. There has been research into  
10 the nutritional and health benefits of mushrooms, there's  
11 a considerable amount of working with grocery store  
12 managers in terms of the placement of mushrooms, safe  
13 storage of mushrooms, other programs of that nature, but  
14 probably the bulk of the expenditures of the program to  
15 date have been for public relations and publicity-type  
16 activities, but there are other activities going on here  
17 as well.

18 QUESTION: Is it correct, as your opponent in  
19 the red brief says, that there are actually two different  
20 rather dramatically different kinds of programs in the  
21 Department of Agriculture and that this is not in the same  
22 group that the one in Wileman was involved in?

23 MS. McDOWELL: Well, it's true, Justice Stevens,  
24 that the program in Wileman Brothers was authorized under  
25 the Agricultural Marketing Agreements Act and programs

1 authorized under that Act sometimes, in most cases, in  
2 fact, do include other regulations, but there are some 11  
3 promotion, research, and consumer information programs  
4 that are quite similar to this one, including the ones in  
5 the beef, pork, and cotton industries. All of these  
6 programs in different years involved different components  
7 of research, consumer information, and promotion. So it  
8 would be difficult to draw a line between which were more  
9 and less like the ones in Wileman Brothers.

10 QUESTION: But did those --

11 QUESTION: I presume you can be forced to  
12 contribute to a program that is clearly against your  
13 economic interests. I mean, you're a peach grower and  
14 you're compelled to contribute to an advertising program  
15 promoting yellowish peaches whereas you're growing orangey  
16 peaches. You could be compelled to do that?

17 MS. McDOWELL: Well, that was certainly one of  
18 the complaints that was raised in Wileman Brothers, and it  
19 wasn't given constitutional significance.

20 QUESTION: So your answer is yes?

21 MS. McDOWELL: Presumably Congress could  
22 determine that there were benefits to be obtained to the  
23 entire industry by promotion that focused at least in one  
24 year on particular products.

25 QUESTION: And make you contribute to the saying

1 that my competitor's product is better than mine?

2 MS. McDOWELL: Presumably Congress could do  
3 that, Justice Scalia, but that's not what this program  
4 does.

5 QUESTION: But in Wileman, the argument, I  
6 didn't think it was a persuasive one, but the argument  
7 that carried the day in Wileman was that the restrictions  
8 on speech, which I agree fall within Justice Scalia's hypo  
9 were justified because they were incidental to and they  
10 were germane to what was a true act of market regulation.  
11 There was regulation by quality control on what could be  
12 marketed, and there was regulation in terms of quantity  
13 that could be marketed. Now, I take it there are no such  
14 features in this case?

15 MS. McDOWELL: That's correct, but I would  
16 disagree with your premise that there were quantity  
17 controls in Wileman Brothers. There weren't. There were  
18 only quality and maturity controls.

19 QUESTION: I'm sorry, you're right. The  
20 standards for bringing fruit to market were in Wileman,  
21 you're right.

22 MS. McDOWELL: Yes. We don't think that those  
23 differences in regulation make any difference with respect  
24 to the First Amendment interests that are implicated here.

25 QUESTION: Well, what do you make of the

1 germaneness argument in Wileman and its relation to this  
2 case? I mean, it's got to be germane, the argument in  
3 Wileman was that the restrictions were germane to these  
4 other market regulatory activities, and what you have  
5 described as the Government's activities here seem to be  
6 entirely either advertising or other promotional  
7 activities. You said, well, they tell the produce  
8 managers where to put the mushrooms in the stores. I  
9 mean, that isn't market regulation. It's, I would say it's  
10 simply promotion, teaching them how to sell mushrooms. So  
11 I don't see that there is anything to which this is  
12 germane which is comparable to the scheme in Wileman.

13 QUESTION: Ms. McDowell, is that perhaps why you  
14 raise an alternative argument, that this, in fact, is  
15 Government speech?

16 MS. McDOWELL: We had raised that alternative  
17 argument, Justice O'Connor.

18 QUESTION: And is it because of this problem  
19 that you've been listening to this morning that it doesn't  
20 appear to be part of a broader regulatory program?

21 MS. McDOWELL: We raised the Government speech  
22 argument because we think it's also a viable argument.

23 QUESTION: Was that argument made below?

24 MS. McDOWELL: No, it wasn't made below. We  
25 believe that it's encompassed by the question presented in

1 our petition, and that the Court has the discretion to  
2 reach that question if it wants to.

3 QUESTION: And are you going to address it in  
4 your argument?

5 MS. McDOWELL: Yes, I will, if I could just  
6 return briefly to Justice Souter's question because I  
7 think our argument in Wileman Brothers and how we read the  
8 Court's opinion is not that the generic advertising  
9 program has to be germane to some separate regulatory  
10 program.

11 QUESTION: Then why did the court spend all the  
12 time that it did discussing germaneness?

13 MS. McDOWELL: Well, as we understand the  
14 Court's opinion, the Court was saying that the generic  
15 advertising program was germane to Congress's interest in  
16 strengthening and stabilizing the market for an  
17 agricultural product, and that's precisely the same  
18 interest --

19 QUESTION: So in that case then you're simply  
20 saying that the advertising scheme was in effect germane  
21 to a general scheme of addressing the desirability of  
22 marketing this material, and that seems to me to read the  
23 germaneness requirement right out of, you know, right out  
24 of any significance.

25 MS. McDOWELL: We would disagree. We think that

1 in both this case and Wileman Brothers there was a  
2 legitimate nonspeech purpose for the regulation, and that  
3 was strengthening and stabilizing the market for a  
4 commodity. It wasn't there and it isn't here simply to  
5 encourage speech about mushrooms.

6 QUESTION: Well, if you're -- I'm sorry.

7 QUESTION: Couldn't at least one read -- there  
8 may be ambiguity in it, but Wileman to have alternative  
9 arguments that is one is the germaneness thing, but then I  
10 think the Court used expressions like in any event, which  
11 sounds like that's a self-standing ground, that it wasn't  
12 necessary to have both, if it had either, it would do.

13 MS. McDOWELL: The opinion certainly can be read  
14 in that manner, and here, as in Wileman Brothers, there is  
15 no political or ideological content to the speech.

16 QUESTION: Ms. McDowell, if germaneness to a  
17 Government regulatory program is irrelevant, how do you  
18 explain the limitations we've placed upon compulsory union  
19 dues? Could a union compel nonunion members to contribute  
20 to union activities other than those of representing the  
21 employees so long as those other union activities are not  
22 ideological?

23 MS. McDOWELL: Yes, the Court has so held in  
24 cases such as Lehnert where the Court allowed nonmembers'  
25 dues to be used to fund certain union programs which were

1 not ideological and were not particularly germane to the  
2 purpose of collective bargaining but were nonetheless  
3 considered to be permissible.

4 QUESTION: So the line gets back to ideology  
5 again, and I do want you to address the Government speech  
6 argument Justice O'Connor -- let me, just one  
7 hypothetical.

8 Suppose that the Government decides that kids  
9 are spending too much money on designer clothes, and they  
10 want them to buy generic clothes, and because they're  
11 causing jealousy in the high schools and all that stuff,  
12 so the Government has a huge advertising campaign, buy  
13 generic clothes, but assesses all the clothing  
14 manufacturers, including the designers, is that  
15 ideological?

16 MS. McDOWELL: We would still view that I think  
17 as a commercial message, but it would be somewhat more  
18 problematic because the clothing producers would be  
19 required to fund a program that's directly contrary to  
20 their interests.

21 QUESTION: But you're controlling consumer  
22 tastes, demands, attitudes. This it seems to me, is  
23 something that our culture, rightly or wrongly, is very  
24 interested in, and you're saying that the Government can  
25 compel people that don't believe in that particular

1 approach to contribute to shaping social attitudes about  
2 it through speech?

3 MS. McDOWELL: It's a somewhat more difficult  
4 question than this one, Justice Kennedy, I will agree with  
5 you. If there is a sufficiently important Government  
6 interest, it might well be permissible. On the other  
7 hand, there are always rational basis standards that  
8 apply, and it might not seem rational to single out the  
9 clothing producers in this instance for that sort of an  
10 assessment. It seems much more rational to impose an  
11 assessment on those members of the industry that benefit.

12 QUESTION: Oh, so now you have to have some  
13 special Government interest?

14 MS. McDOWELL: Pardon me?

15 QUESTION: Now you have to have some special  
16 Government interest, some compelling interest that the  
17 Government is accomplishing?

18 MS. McDOWELL: Perhaps an important interest  
19 under the Abood standard if one is to view this as  
20 ideological speech.

21 QUESTION: Do you know the last case in which a  
22 tax scheme was stricken down because the objects of it  
23 were irrational?

24 MS. McDOWELL: It happens rarely, Your Honor,  
25 but perhaps Congress could be --

1                   QUESTION: Very, very rarely rational basis of  
2 taxation is almost anything goes. I can't imagine  
3 striking down that scheme on the basis that it's  
4 irrational because of the taxpayers identified.

5                   MS. McDOWELL: Well, the Court certainly has  
6 done that in instances where the group singled out the  
7 taxation was, for example, the media, but obviously the  
8 hypothetical posited by Justice Kennedy wouldn't involve  
9 that. If I could get --

10                   QUESTION: I think we deflected Justice  
11 O'Connor's question about Government speech.

12                   MS. McDOWELL: I was about to get back to that,  
13 thank you. It's our view that the speech here is speech  
14 of the Government, funded by taxes or user fees on those  
15 who are perceived by Congress to benefit the most from the  
16 speech.

17                   QUESTION: But does the tax apply to everybody  
18 who benefits from the speech?

19                   MS. McDOWELL: Pardon me?

20                   QUESTION: Is the tax imposed on every producer  
21 who benefits from the speech?

22                   MS. McDOWELL: It's imposed on those who  
23 Congress determined would benefit the most.

24                   QUESTION: Is it imposed on all of those who  
25 benefit from the speech?

1 MS. McDOWELL: Surely there may be some small  
2 producers that --

3 QUESTION: Is it imposed on all those who  
4 benefit from the speech?

5 QUESTION: Answer the question.

6 QUESTION: Yes or no.

7 MS. McDOWELL: No, no.

8 QUESTION: Okay.

9 MS. McDOWELL: And indeed Congress perceived the  
10 statute to benefit the entire agricultural industry, and  
11 indeed the entire agricultural industry does not pay those  
12 assessments, either, but Congress determined that the  
13 major mushroom producers would be the ones who benefited  
14 the most, and the vast majority of the industry does  
15 contribute to the assessments.

16 QUESTION: Well, how about our old Butler case  
17 you know, in 1936, where there was a tax on processors  
18 that the Court held was unconstitutional because it was  
19 misdirected. Now, then the case may not be good law  
20 anymore, but certainly you've got some problem with a tax  
21 which is imposed on some people but benefits a lot of  
22 other people.

23 MS. McDOWELL: Well, Congress could reasonably  
24 determine that the costs of imposing the tax on the very,  
25 very small producers would exceed the benefits of doing

1 so. For example, under the current assessment of a  
2 quarter cent per pound of mushrooms produced, the smaller  
3 producers, those who are exempt, would pay at most \$1250 a  
4 year, and that's really a very small amount.

5 QUESTION: If you treat this as simply a tax  
6 thing, a tax scheme, that's probably our most lenient  
7 standard of review, but you have the commercial speech  
8 cases which talk about an intermediate level of scrutiny  
9 well above even ordinary rational basis.

10 MS. McDOWELL: Well, that's correct, but we  
11 don't believe that the commercial speech cases, Central  
12 Hudson, and so on are applicable here because we're not  
13 talking about restrictions on anyone's speech or  
14 regulations of speech. Rather, we're talking about a  
15 program that imposes a tax or user fee for the purpose of  
16 encouraging more consumer speech, not less.

17 QUESTION: Is there any message here other than  
18 --

19 QUESTION: Well, that argument's rejected in  
20 Buckley --

21 QUESTION: -- mushrooms are so good for you? I  
22 mean, I thought that that was your central point, that  
23 unlike Central Hudson, this is not a restriction on what  
24 anybody can say. This is just a message that presumably  
25 all who sell mushrooms couldn't object to.

1 MS. McDOWELL: That's correct, Justice Ginsburg.

2 QUESTION: The argument you just made, that the  
3 Government is paying to have more speech was exactly the  
4 argument we reject in Buckley where the campaign finance  
5 rule that we struck down said, you know, we need to hear  
6 from more people, not less, and so we're going to restrict  
7 some people's speech, and the courts refused to go along  
8 with that.

9 MS. McDOWELL: Yes, in contrast to Buckley,  
10 though, this isn't a program that restricts people's  
11 speech, that limits how much mushroom producers can speak.  
12 They are free to speak as much as they want to. They are  
13 only required to contribute money to this program in  
14 addition so that there can be generic speech.

15 QUESTION: What is our closest case that  
16 supports this kind of fee to pay for some kind of  
17 Government-designed speech? What do you rely on?

18 MS. McDOWELL: I'm not sure that we have any  
19 case of this Court that involves a targeted fee to pay for  
20 a Government speech program. Certainly the Court has  
21 recognized, although not necessarily relied as a holding  
22 on the principle that the Government isn't subject to the  
23 constraints of the First Amendment when it speaks on its  
24 own behalf, and the Court has recognized that all  
25 Government programs don't have to be funded through

1 general tax revenues but can be targeted, can be funded  
2 through a variety of user fees and other targeted taxes.

3 QUESTION: Well, I'm not sure it would be a  
4 stable or a workable line, but it does seem to me that  
5 there's not much we can do about Government speech, but  
6 maybe at least we can say it has to be funded by general  
7 revenues and not from a targeted group that objects to it.

8 MS. McDOWELL: Well, that would obviously be a  
9 line could you draw, Justice Kennedy. There are some  
10 cases that have similar aspects, where the Government has  
11 imposed a user fee on individual speakers, for example in  
12 the context of the Cox case, the Court recognized that  
13 user fees could be imposed to reimburse local Government  
14 for the costs of administering parades, and so there seems  
15 to be nothing inconsistent with the First Amendment with  
16 requiring special taxes or assessments for speech  
17 activity.

18 QUESTION: Is there anything --

19 QUESTION: May I ask, if the Government has made  
20 this argument, and there have been a bunch of these cases  
21 involving different programs, meat and pears and so on.  
22 Has the Government made the Government speech argument in  
23 any of these other cases?

24 MS. McDOWELL: Yes, we made the argument in the  
25 Frame case, which was the case that conflicted with

1 Wileman Brothers, a Third Circuit case. The Third  
2 Circuit, although it perceived the question as a close  
3 one, did not rule for the Government on the Government  
4 speech ground. It instead ruled on the ground that there  
5 was a compelling interest for the beef program, which is  
6 very much like the mushroom program.

7 QUESTION: Right. I had one other question  
8 that's based on something in the red brief. I don't  
9 recall this, but they quote from the oral argument in the  
10 case, the Wileman case, saying that the Government said  
11 they would lose if it were not a marketing program like  
12 this, is that a correct statement?

13 MS. McDOWELL: No, it's not a correct statement,  
14 Your Honor. What we said was that if the Court didn't  
15 recognize that there was an important purpose to be served  
16 by these programs, we would lose, but we didn't tie our  
17 argument in Wileman to the existence of additional  
18 regulation.

19 QUESTION: I see.

20 QUESTION: Why do we need an important purpose  
21 other than just to solve rational basis, in which case is  
22 any old purpose? Is it important because speech is  
23 involved?

24 MS. McDOWELL: We were arguing in that case  
25 pre-Wileman, obviously, before the Court's Wileman

1 decision that the Abood standard was the appropriate one  
2 to apply in these cases, and under Abood the speech  
3 program that's funded by the objectors has to be germane  
4 to an important Government purpose, and so that's why we  
5 were arguing that the purpose was at least important. We  
6 would argue, of course, that the purpose of the Mushroom  
7 Act is also an important one to strengthen the mushroom  
8 industry, as Congress found, and to thereby strengthen the  
9 entire agricultural commodity.

10 QUESTION: Is there anything that Congress does  
11 that is not important? I mean, if strengthening the  
12 mushroom program is important, what is not important? Can  
13 you give me an example of some Government program that is  
14 not important, less important than strengthening the  
15 mushroom program?

16 MS. McDOWELL: I wouldn't be able to give you  
17 one, Justice Scalia, but certainly in this case Congress  
18 conducted hearings on the Mushroom Act, heard from both  
19 sides of the issue, and heard some legitimate concerns  
20 from members of the mushroom industry about developments  
21 in the industry over the past decade or so that had  
22 resulted in many mushroom farmers going out of business.

23 QUESTION: There's a mushroom caucus in  
24 Congress, isn't there?

25 MS. McDOWELL: I'm not aware of that, Mr. Chief

1 Justice.

2 QUESTION: A subterranean group, no doubt.

3 MS. McDOWELL: To get back to the Government  
4 speech argument, we would emphasize that the Mushroom  
5 Council, the entity that engages in this speech, was  
6 created specially by Congress, Congress specified that the  
7 Secretary of Agriculture would appoint all members of the  
8 Mushroom Council, Congress specified the categories of  
9 activities in which the Mushroom Council could and could  
10 not engage and Congress provided that the Secretary of  
11 Agriculture would have to approve each plan, project, and  
12 budgeted the Mushroom Council before it was --

13 QUESTION: Well, what's the case or the rule or  
14 the line of doctrine that says speech interests can be  
15 abridged because there's an important, as opposed to  
16 simply a rational, Government interest? That sounds to me  
17 like a new line of cases.

18 MS. McDOWELL: Well, we would suggest that this  
19 particular program doesn't involve any infringement of  
20 speech interests at all. The Court has suggested that  
21 there are some First Amendment interests --

22 QUESTION: Well, but that's --

23 MS. McDOWELL: -- implicated in cases such as  
24 Abood with --

25 QUESTION: But then why are you saying it has to

1 be an important interest? Then if speech isn't involved,  
2 then just any old rational basis will do, the Government  
3 can do whatever they want.

4 MS. McDOWELL: Well, that's correct, and that's  
5 what the Court seemed to recognize in Wileman Brothers,  
6 that this case did not implicate any special First  
7 Amendment interests at all and therefore rational basis  
8 applied. We had argued in Wileman Brothers not for a  
9 standard that lenient but for the Abood standard, and we  
10 were arguing there that the programs from California tree  
11 fruits satisfied that standard, as would the mushroom  
12 program here. No further --

13 QUESTION: There is another question I have on  
14 the Government speech argument. How significant is it  
15 that it wasn't raised below, and you're the petitioner,  
16 you're not the respondent? I know you say it's embraced  
17 within the question presented, but does that satisfy the  
18 procedural requirement? Normally when petitioner relies  
19 on an argument, the petitioner should have raised it at  
20 some earlier stage in the litigation.

21 MS. McDOWELL: We should have raised it, Your  
22 Honor, that's true. We didn't. We think that the Court  
23 certainly has jurisdiction and discretion to address it in  
24 this case, and the Court has addressed similar cases that  
25 have come up in similar circumstances. When cases occur

1 --

2 QUESTION: What's the closest case you can call  
3 our attention to that would say you have not procedurally  
4 defaulted the issue?

5 MS. McDOWELL: Vance v. Terrozzas, 444 U.S. 252,  
6 a 1980 decision by Justice White.

7 QUESTION: Does it matter if they have an  
8 ideological objection? I noticed in their brief they said  
9 they objected to the association of mushrooms with  
10 alcohol, for example.

11 MS. McDOWELL: No, we believe that under Wileman  
12 this is not the sort of objection that would amount to an  
13 ideological one, one that would invalidate the entire  
14 program. It's more as the Court put it in Wileman, a  
15 disagreement about tactics.

16 QUESTION: Is there a procedure to object to  
17 that? It's one thing to say that mushrooms are so good to  
18 eat, but if one says they're an aphrodisiac, is there a  
19 procedure to object to that kind of advertisement?

20 MS. McDOWELL: There is certainly a procedure  
21 through the Mushroom Council which consists of persons who  
22 were nominated by members of the mushroom industry to  
23 contact them and to express disagreement.

24 QUESTION: How about the Secretary of  
25 Agriculture?

24

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1 MS. McDOWELL: Such complaints can certainly be  
2 voiced to the Secretary of Agriculture as well. There's  
3 not a mechanism, for example, for obtaining a refund for  
4 this sort of expression with which one might disagree, but  
5 there are avenues for expressing objections. Indeed, I  
6 would note that respondent's own representative was a  
7 member of the Mushroom Council at the time that the  
8 so-called aphrodisiac program was implemented, and he  
9 voiced his objection to it at the time and apparently was  
10 not persuasive to the other members of the Council, but he  
11 certainly was heard on that matter. If there are no  
12 further questions, I will reserve the remainder of my  
13 time.

14 QUESTION: Very well, Ms. McDowell.

15 Mr. Tribe, we'll hear from you.

16 ORAL ARGUMENT OF LAURENCE TRIBE

17 ON BEHALF OF RESPONDENT

18 MR. TRIBE: Thank you. Mr. Chief Justice, and  
19 may it please the Court:

20 Because something in this case does appear to  
21 turn on whether merely rationality review is appropriate  
22 or whether one needs something more important, we would  
23 suggest very much more important since we do think this is  
24 a free speech case, I wanted to begin with Justice  
25 Scalia's question, is there anything that Congress does

1 that is not important.

2 I think it's a question, however couched, that  
3 one really has to address in the context of these programs  
4 because, as the Solicitor General mentioned, there are a  
5 dozen programs in which Congress has essentially provided  
6 for the Government to mandate that growers and producers  
7 pay for advertisement and then although there is some  
8 other informational stuff, that's the core of it, and in  
9 this case, as we point out in footnote 7 of our brief,  
10 it's 98 percent of it.

11 These other programs are really quite haphazard.  
12 They cover blueberries but not raspberries. They don't  
13 cover strawberries. They cover avocados, not artichokes.  
14 They cover popcorn. At 1996 Congress found specifically  
15 that popcorn has all of the characteristics of mushrooms  
16 vital to the economy, and indeed it was in 1996 determined  
17 by Congress that canola is even more important to the  
18 survival of the economy and yet no canola program was put  
19 in place, and maybe that explains why problems are  
20 occurring.

21 QUESTION: Mr. Tribe, how does that differ from  
22 some tree fruits that were covered and others weren't in  
23 Wileman?

24 MR. TRIBE: Not at all, but in Wileman you had  
25 an economic regulation essentially, and as the Chief

1 Justice pointed out in his concurring opinion in the  
2 Greater New Orleans case, the various haphazard features  
3 of the commercial regulation there, of commercial speech  
4 might have been constitutionally tolerable if Congress had  
5 undertaken substantively to regulate the gambling  
6 industry. That's a very fundamental difference.

7 Of course, one finds a crazy quilt pattern and  
8 one doesn't inspect Congress' findings when merely  
9 rationality is involved, but if we are to accept the  
10 Government's theory, and I want to turn to Government  
11 speech in a moment, if we're to accept the Government's  
12 theory that whenever there is an interest, not a program,  
13 not a regulatory regime, nothing like collective  
14 bargaining or a labor union with an integrated set of  
15 obligations or an integrated bar, as in the Keller case,  
16 but just an interest, like the interest in not having kids  
17 waste too much money on designer clothes. Whenever you  
18 can posit an interest in the air and then you can find  
19 speech that would advance that interest, that's all you  
20 need. Now, that would be an astonishing principle.

21 QUESTION: Why is it astonishing? Suppose the  
22 Government were to say museum goers pay an extra ten cents  
23 on a ticket so that we then can advertise to the inner  
24 city the presence of museums. Suppose that you had  
25 tobacco, and they said we want to charge 50 cents more a

1 cigarette pack so that we can advertise that cigarettes  
2 are bad for you? All right, I mean, you can think of --

3 MR. TRIBE: Sure.

4 QUESTION: -- lots of things that are not the  
5 slightest bit absurd.

6 MR. TRIBE: Right.

7 QUESTION: And you're saying that all those  
8 things are unconstitutional?

9 MR. TRIBE: I'm not. I'm not. I do believe  
10 that the Court would have to break new ground, perhaps  
11 along the line Justice Kennedy has suggested if there were  
12 Government speech. In your questions, Justice Breyer, you  
13 said we, we.

14 QUESTION: Oh, no, there isn't. In my questions  
15 there is no Government speech.

16 MR. TRIBE: Well, who is the we in your  
17 question?

18 QUESTION: The we is that they have the museum  
19 council, and the museum council is told by statute to  
20 collect ten cents on each ticket to advertise museums in  
21 the inner city or we have the tobacco council, and the  
22 tobacco council is told to collect 50 cents a pack to  
23 advertise that tobacco smoking is bad for you. Now, I'd  
24 want to know -- all those things seem identical to me.

25 MR. TRIBE: Well, it seems to me that I really

1 should turn to whether this is speech for which the  
2 Government bears responsibility because it seems to me  
3 that in all of your cases, whether the ultimate vehicle  
4 for the speech is the tobacco council or the Government,  
5 it's the Government's message. It's quite different to  
6 say that we're going to take money from private  
7 enterprise, private individuals, we're going to give it to  
8 other private individuals so that they can compose a  
9 message, like a message that brands don't make any  
10 difference, if you've seen one mushroom, you've seen them  
11 all, a message which is very much opposed to the interest  
12 of those who are forced to pay.

13 Now, if this were Government speech, where  
14 Government is accountable to the people, a principle like  
15 Justice Kennedy, saying that as long as the beneficiaries  
16 are the ones who are taxed might suffice, but let me turn  
17 to whether it's Government speech because I think when we  
18 get back to the question of whether it can survive on any  
19 other theory, it will be fairly clear that it cannot.  
20 Now, I'm not going to spend time on whether this issue is  
21 properly before the court, except to say that it's not  
22 just a technicality, it's not simply that the matter was  
23 not raised or addressed below, and --

24 QUESTION: Well, to what extent do you have to,  
25 you know, if you lose a case in the court of appeals, your

1 common sense tells you have a little bit different  
2 emphasis in the Supreme Court, maybe you'll win.

3 MR. TRIBE: Oh, I understand their reasons for  
4 doing it. I just wanted to say what reasons the Court  
5 might have for not letting them do it. And that is that  
6 if you look at the face of this law, as I'll explain in a  
7 moment, it's not Government speech. To show that it was,  
8 they would have to adduce some facts, as in Brentwood.

9 QUESTION: But we're talking about the First  
10 Amendment. This is just one strand as opposed to another  
11 strand of First Amendment arguments.

12 MR. TRIBE: I'm not saying the Court lacks  
13 jurisdiction, but I'm saying in order to establish that  
14 the Government is really responsible for these messages,  
15 despite the fact that under the regulations and the  
16 statute, the secretary cannot, in fact, reject a message  
17 for any reason other than that the program established by  
18 the Mushroom Council, it violates the statute, or that the  
19 message derogates another individual's product. The  
20 message is composed by these private individuals in the  
21 Mushroom Council. The members of the Mushroom Council are  
22 selected by nomination from the private industry. The  
23 Government is simply saying, promote mushrooms.

24 Now, if that is Government speech, it seems to  
25 me that in a case like, oh, for example, it seems to me

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1 that in the Amtrak case where they rely heavily on Lebron,  
2 in Amtrak where this Court did hold that for purposes of  
3 making first amendment arguments against Amtrak, it is an  
4 instrumentality of the Government, but the artist who  
5 wanted to put something on that huge billboard in Amtrak's  
6 Penn Station was not going to be propagating a Government  
7 message simply because the Government was providing the  
8 facility.

9 The question of whether you can make a First  
10 Amendment argument against an entity whether it's  
11 sufficiently the Government for that purpose, has nothing  
12 to do with the question of whether it is Government speech  
13 when that entity, as in the case of the Mushroom Council,  
14 uses its private capacity to propagate messages in its  
15 private interests.

16 QUESTION: Mr. Tribe, I thought that the  
17 Secretary of Agriculture was the one who had the ultimate  
18 say about whatever message the Council proposed would, in  
19 fact, be allowed to be spoken. Isn't that so? Couldn't  
20 the Secretary of Agriculture say I veto this message, we  
21 won't have it?

22 MR. TRIBE: He could under the statute, only if  
23 the message is not consistent with the statute. If he  
24 does not have general sensorial powers, he's not an editor  
25 under this statute. So that --

1                   QUESTION: I thought he's an approver, that if  
2 he doesn't approve, the message doesn't go out. Isn't that  
3 so?

4                   MR. TRIBE: He has the ultimate power to approve  
5 the whole program. The program is approved by him. But  
6 he does not have authority to disapprove a campaign of  
7 advertising under the program on the ground that he  
8 doesn't like what it says. He has never exercised such  
9 authority, the regulations don't --

10                  QUESTION: Maybe he hasn't exercised it, but  
11 where in the statute does it say he doesn't have that  
12 authority?

13                  MR. TRIBE: Well, in the guidelines of the  
14 Department of Agriculture itself for oversight of  
15 commodity research, on page 49 of our brief, the  
16 description is that the agricultural marketing service  
17 only reviews materials to ensure that they are in  
18 compliance with the applicable legislative authority. I  
19 don't know if one could construe this statute to make the  
20 Secretary of Agriculture assume a purely editorial  
21 capacity, I rather doubt it, but clearly no such  
22 construction has been suggested by the agency that  
23 administers the statute.

24                  I think the idea that the Mushroom Council is  
25 somehow the voice of America is not plausible. It's not

1 plausible because this is not a message that the  
2 Government has in any way organized or composed, and if  
3 one did take that view --

4 QUESTION: Suppose there were some sort of a  
5 disclaimer or an affirmation, I suppose it would be, this  
6 message is required and permitted by a Governmental  
7 program and Governmental regulations.

8 MR. TRIBE: The fact that it is permitted by  
9 Government does not mean that it is Government's voice. A  
10 great deal is permitted by the Government. If it is  
11 required, if the exact words are required, the words on a  
12 cigarette package, the surgeon general has determined that  
13 this is detrimental to your health. That's Government  
14 speech. But if we say this is Government speech, then  
15 much of what this Court was struggling with, in cases like  
16 Keller and Lehnert, the speech of a State bar association,  
17 an integrated bar, which the Chief Justice in his opinion  
18 for a unanimous Court pointed out the integrated bar for  
19 some purposes might be the Government, but the expressive  
20 activities in which it engages, even if they are germane  
21 to the purposes of collective bargaining, that is, even if  
22 they are related to the process of exclusive  
23 representation and therefore squarely within the ambit of  
24 what the Government has authorized the entity to do in the  
25 case of a labor union, and even if they are part of the

1 process of regulating the legal profession or improving  
2 legal service, it doesn't make it Government speech.

3 In fact, the magic wand of Government speech  
4 would obliterate a great deal of the doctrine this Court  
5 has carefully built. I do think it's worth looking at the  
6 reasons.

7 QUESTION: Would it be Government speech,  
8 though, with the museums?

9 MR. TRIBE: Well, if you had a comparable.

10 QUESTION: I mean, what they're doing is a tax,  
11 museums, they're private organizations.

12 MR. TRIBE: Well, taxing the consumer of a  
13 product --

14 QUESTION: No, no, no. What happens, they raise  
15 it the same way. I just want to make it the same.

16 MR. TRIBE: I don't care if it's a tax.

17 QUESTION: I want to make it the same.

18 MR. TRIBE: Okay.

19 QUESTION: And then the museums are going to  
20 advertise throughout the city the arts. They are going to  
21 say come to the museums, the arts.

22 MR. TRIBE: To make it the same -- I'm sorry.

23 QUESTION: It could happen.

24 MR. TRIBE: I didn't mean to interrupt. To make  
25 it the same, Justice Breyer, you would have to have a

1 group of museums, some of them believing that all museums  
2 are the same, and you don't have to have anything fancy in  
3 the museum, it doesn't really matter if you have any  
4 Jackson Pollack, you just put stuff up, and other museums  
5 that specialize, and they have brands. And now the  
6 Government comes along and says, all of you are free to  
7 say what you want about whether you will have Picasso  
8 there or Jackson Pollack.

9 QUESTION: Well, then the test just is whether  
10 or not it's against a particular taxpayer's or  
11 contributor's interest. I don't think that's going to  
12 work. I'm concerned about the museum, hypothetical --

13 QUESTION: I think the users --

14 QUESTION: Even the -- see, the problem is you  
15 go in, what the actual problem it seems to me, and through  
16 tobacco, is to start making these distinctions. I don't  
17 know what kinds of lines we're going to have to draw.  
18 Does the fact that it's a tobacco, antismoking message  
19 make the difference, all other things being the same?

20 MR. TRIBE: I see the problem, but the quicksand  
21 that you're describing, I think, one can avoid to some  
22 extent by saying that the Government does not have the  
23 power without complying with a very stringent First  
24 Amendment requirement to make people speak, either speak  
25 directly or contribute to someone else who then propagates

1 a message in effect in their name.

2 It's true that when I buy a product, the price  
3 may include the advertising costs. I buy Pictsweet  
4 mushrooms and it -- but if we say the Government can make  
5 the people who sell clothes say that it's not very good to  
6 buy designer clothes, then we are lost.

7 QUESTION: So what would happen in this case,  
8 everything's the same except the Department of Agriculture  
9 writes all this stuff? They assess, then you would have  
10 somebody in the Department of Agri -- that would bring it  
11 on a parallel with the museum hypothetical.

12 MR. TRIBE: I think general, what I would like  
13 to see, but the Court has really not struggled with  
14 problems in this precise area, I would like to see a  
15 principle that says that Government speech, when the  
16 Government takes responsibility for it, and assumes the  
17 shield from First Amendment scrutiny must be funded from  
18 general revenue.

19 QUESTION: Of course it could be, Mr. Tribe,  
20 that the mushroom example strikes us as different from the  
21 museum example or the tobacco example simply because we're  
22 more permitting of restrictions upon free speech for  
23 reasons that we consider good, and maybe we like museums a  
24 lot and we hate smoking a lot, and we're quite indifferent  
25 to mushrooms. That might express, it might be the reason

1 behind why these examples cause difficulty. I frankly  
2 don't see any more justification for the museum example or  
3 the tobacco example than I do for the mushrooms.

4 QUESTION: I think that's right, Justice Scalia.  
5 That is, apart from the portion of your statement that  
6 said we're indifferent about mushrooms, which doesn't  
7 reflect my present state of mind, apart from that, I think  
8 that it should not be permissible for the Government to  
9 make people propagate messages. How can it possibly make a  
10 difference whether we are told, you'd better hire an  
11 agency next year and spend a hundred thousand dollars and  
12 advocate the following view, either that mushrooms are not  
13 so good for you or that mushrooms are great or that  
14 mushrooms make you want to smoke and therefore they're not  
15 good for you.

16 QUESTION: The surgeon general has determined  
17 that smoking is hazardous to health. That's a message  
18 that the Government compels every cigarette manufacturer  
19 to put.

20 MR. TRIBE: That's right.

21 QUESTION: Are you saying in your answer to  
22 Justice Scalia that that too is in violation of the First  
23 Amendment?

24 MR. TRIBE: Well, Justice Ginsburg, I think the  
25 principle that sometimes what you don't say is as

1 important as what you do explains why in cases like  
2 Zouderer and DeBonyez the Court has stopped short of  
3 saying that the Government may never fill in the gaps in  
4 someone's commercial.

5 That is, if one is selling cigarettes and not  
6 mentioning that, by the way, they may kill you, perhaps  
7 the Government has the power, it's been assumed that it  
8 does, to say you better add that to your message, but this  
9 is not a case where there is a gap in speech that's being  
10 filled by the Government to protect consumers. Here the  
11 Government says we want essentially to manipulate consumer  
12 preference. It's exactly like Liquormart except a mirror  
13 image. In Liquormart this Court essentially said, if you,  
14 I think, combine the opinions I think this Court said,  
15 that if your purpose is to affect consumption, in that  
16 case of liquor, by affecting price, and to affect price  
17 by, in that case, wording competition because competition  
18 might drive price down and drive consumption up. Then you  
19 at least have to satisfy Central Hudson, you would at  
20 least --

21 QUESTION: But then these cases, like Central  
22 Hudson, say this is what you can't say. In this case the  
23 argument is nobody is stopping any individual producer  
24 from saying whatever they want to say. They must in  
25 addition support the generic advertising, but except for

1 the theory that there's only a limited kitty and if I have  
2 to support generic I won't be able to plug my own product,  
3 it is very different from saying I'm closing your mouth,  
4 you cannot say X. I'm saying you can say X, but you must  
5 in addition say Y.

6 MR. TRIBE: Justice Ginsburg, in Riley and in  
7 Hurley, this Court said it's not very different. Forcing  
8 you to say X is not different from preventing you from  
9 saying Y, and that's why the example I just --

10 QUESTION: If I may just interrupt, nobody's  
11 forced to say anything here. Your client doesn't have to  
12 say anything. All he has to do is pay money into a fund.

13 MR. TRIBE: A corporation never can say  
14 anything, all it can ever do is pay money.

15 QUESTION: No, but it can finance its own  
16 message. It is not being compelled to say anything as a  
17 separate entity.

18 MR. TRIBE: I understand, Justice Stevens, and I  
19 think technically -- well, that's why I gave the example  
20 of go and hire an ad agency. If the only thing that Riley  
21 and Hurley prevent is having the Government actually say  
22 to you, you must use your own employees to get out the  
23 following message, then it would follow that they could  
24 require us, just as they can require us to put money in  
25 the kitty of the Mushroom Council so that they can speak

1 for us, they could require to us go out and hire an ad  
2 agency and put out a certain kind of message and spend a  
3 hundred thousand a year because they wouldn't be buttoning  
4 our lip. And by the way, the message better be, all  
5 mushrooms are great.

6 It seems to me if we've had to hire an ad  
7 agency, no one here would doubt that that violated the  
8 First Amendment, to require us to do it, and yet that  
9 would be better for us than having to rely on the Mushroom  
10 Council.

11 QUESTION: Can the Government just advertise  
12 mushrooms on its own?

13 MR. TRIBE: I believe it can. The Government can  
14 --

15 QUESTION: Just some kinds of mushrooms?

16 MR. TRIBE: It can be selective. The Government  
17 can -- viewpoint based in its speech.

18 QUESTION: But it can't target a particular  
19 group to pay for that?

20 MR. TRIBE: I think the moment you start  
21 targeting people to pay for speech, a certain subgroup,  
22 there is a First Amendment problem.

23 QUESTION: Of course you think of the securities  
24 area where it's among municipal bonds, as soon as you get  
25 into that it's a common thing for a Government to require

1 people to take certain newspaper ads, to have certain  
2 kinds of prospectuses.

3 MR. TRIBE: To protect consumers.

4 QUESTION: Well, ah yes, all right. Now, just  
5 for reasons that are good reasons. I mean, this may be  
6 quite basic, and the cases may just not permit me to ask  
7 this question, but I just wonder why it is that  
8 advertising here you're going to treat differently from  
9 solicitation to buy stocks from any one of thousands and  
10 thousands of business activities carried on, as all  
11 business is, through speech acts which are subject to wide  
12 varieties of regulations, subsidy, dozens of things.

13 MR. TRIBE: Justice Breyer, I think there is a  
14 common theme that's very important, and that is,  
15 regulation designed to eliminate impediments to fair  
16 bargaining may sometimes involve an informational  
17 component. Certain kinds of deception interfere with the  
18 ability of people to operate in the marketplace of ideas  
19 and goods and services. It's on that theory that the  
20 commercial speech doctrine can make some sense, and as  
21 suggested in a number of this Court's opinions that I  
22 think may converge to that view, whenever you try to  
23 manipulate preferences rather than enabling people to  
24 express them, you are essentially playing a big brother  
25 role with information. That's why there's a fundamental

1 difference in principle between saying, in this case you  
2 better add a certain warning or you will be fundamentally  
3 fooling the person on the other side of the bargaining  
4 table --

5 QUESTION: Is the fundamental principle --

6 MR. TRIBE: -- and saying you better say the  
7 following kind of thing because it's important to us that  
8 you say it.

9 QUESTION: Is the fundamental principle just  
10 that there's a slippery slope here? Suppose you have  
11 tires that are coming apart at high speeds, there's two  
12 ways to solve it. One is for the Government to inspect  
13 everything and to charge the tire makers for the  
14 inspection fee and then put a Government inspection label  
15 on it. I assume no problem with that.

16 MR. TRIBE: Right.

17 QUESTION: Auto tire -- tire makers have to pay  
18 for it. Let's say that it is more cost-effective for the  
19 tire makers to simply advertise that they have been  
20 inspected by the Government and the tire makers are  
21 required to do that. Assume that it costs the same or  
22 even less to require the advertising scheme, but that the  
23 same objectives are achieved so far as the market. Why is  
24 the Government prohibited from doing one and not the  
25 other, just because of the slippery slope of speech?

1                   MR. TRIBE: Well, I wouldn't minimize the  
2 importance of the slippery slope, but I'm not sure that  
3 the advertisement of the fact, the mere fact that you've  
4 been inspected by the Government is anything more than  
5 requiring you to be a vehicle for Government speech, and  
6 cases like Wooley v. Maynard supposedly limit that. They  
7 limit it on the ground that if the message is ideological,  
8 you shouldn't be forced to do it.

9                   But there's the slippery slope. Where does  
10 ideology end? Ethical treatment of mushrooms. It seems  
11 to me that it's far safer in terms of protecting people  
12 from either having the Government button their lip or  
13 having the Government force them to speak, to limit the  
14 Government's power with respect to mandating speech or  
15 mandating the funding of speech to cases where the  
16 Government can show not just any old general important  
17 interest because that's unlimited, but show that the  
18 transactions involved are going to be significantly  
19 distorted by either misinformation or by overbearing  
20 unless a certain message is included.

21                   The moment you go beyond that, it seems to me,  
22 the moment you take advantage of that branch of the  
23 Central Hudson test which allows the Government  
24 effectively to control speech in order to manipulate  
25 preferences because it's in the public interest, you've

1 abandoned the premise of Virginia Board of Pharmacy and of  
2 the whole line of cases that follow it.

3 QUESTION: So you don't like the museum and the  
4 smoking example, right? I mean, on that theory, they  
5 would be bad.

6 MR. TRIBE: I think so, but I do want to remind  
7 the Court that the issue here is principally whether this  
8 program can escape scrutiny under the First Amendment, not  
9 whether it is bad under the First Amendment.

10 QUESTION: But I thought the smoking, I thought  
11 the justification for the smoking example, as you put it,  
12 was to fill a gap, which I took it as a way of saying it  
13 required the correction of what would otherwise have been  
14 a misleading presentation by the tobacco company.

15 QUESTION: Excuse me, I meant the other smoking  
16 example of general advertising, smoking is bad --

17 QUESTION: Oh, oh, oh.

18 QUESTION: -- not the thing on cigarettes.

19 MR. TRIBE: Right, I have no problem with the  
20 thing on the package --

21 QUESTION: I'm sorry, okay.

22 MR. TRIBE: -- but making the industry fund a  
23 campaign.

24 QUESTION: And likewise here if every 100th  
25 mushroom was blue and blue mushrooms made you sick, there

1 would be no problem --

2 MR. TRIBE: No problem at all.

3 QUESTION: -- in funding a scheme saying look  
4 out for the blue mushroom?

5 MR. TRIBE: Look out for the blue mushroom,  
6 that's right. No problem whatever. Whether this program  
7 should be subject to First Amendment scrutiny other than  
8 on the Government speech theory, which as I tried to  
9 explain, I think, does not work, depends, I think, on  
10 whether it is ancillary to something, that is, it's not a  
11 question of exactly what all the bells and whistles look  
12 like in the regulatory program for nectarines and peaches.

13 It was clear, as this Court repeatedly  
14 emphasized, including in the section of the opinion  
15 explaining why the Central Hudson framework didn't fit, it  
16 was clear that the fundamental structure of the program  
17 was to replace individual choice and competition with  
18 collectivization, and when you do that, the premises of  
19 Central Hudson don't work, and when you collectivize,  
20 among other things, people don't necessarily have much  
21 incentive to say things that will have positive spillover  
22 effects for other people's products. There's a kind of  
23 advertisement gap which perhaps the Government could fill  
24 the way it did in Wileman. It's a close question.

25 QUESTION: Mr. Tribe, all this depends on your

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1 reading Wileman in a way other than Justice Souter  
2 appeared to read it in his footnote 3 when he said --

3 MR. TRIBE: Uh-huh.

4 QUESTION: -- germane is one thing or is not  
5 ideological. He seemed to think that this opinion had two  
6 legs, and it could stand on one or the other.

7 MR. TRIBE: Well, I must say I read the in any  
8 event phrase, which is pivotal here.

9 QUESTION: That's from the --

10 MR. TRIBE: From the -- right.

11 QUESTION: -- the Court's opinion.

12 MR. TRIBE: I know. I read it less literally.

13 QUESTION: I'm reading the -- or from the  
14 dissenting opinion.

15 MR. TRIBE: Right. But it seems to me that all  
16 one really has to ask is whether it would be conceivable  
17 to have a rule that says as long as it's not ideological,  
18 it doesn't matter whether it's germane to anything, you  
19 can make people speak about it, so we could make the  
20 mushroom people distribute copies of weather reports to  
21 everyone in the country. You might come up with a  
22 rationalization for that. If on the other hand --

23 QUESTION: Wasn't it true that in the Wileman  
24 that the object -- it wasn't cartelization, there weren't  
25 price or production regulations, there were simply

1 regulations as to product quality.

2 MR. TRIBE: Well, but for one thing you can have  
3 a serious antitrust conspiracy simply because of minimum  
4 quality agreements.

5 QUESTION: Yeah, that's true.

6 MR. TRIBE: But it really went beyond that.  
7 Also, there were size restrictions on the fruit.

8 QUESTION: Poor quality --

9 MR. TRIBE: The nectarine.

10 QUESTION: -- is one manner of competing, you  
11 sell poor quality --

12 MR. TRIBE: Exactly, exactly.

13 QUESTION: -- goods at a cheaper price. Some  
14 people prefer to pay less and can't tell the difference.

15 MR. TRIBE: But clearly they were immune, for  
16 example, from the antitrust laws. This was now  
17 collectivized, and so all the talk about the free market  
18 of information which underlies and undergirds Virginia  
19 Board didn't apply.

20 QUESTION: The only difference was the  
21 particular thing. Germane there to product quality,  
22 germane here to expanding the market.

23 MR. TRIBE: But that's always present. That is,  
24 if you want to -- germane in Liquormart to having people  
25 consume less liquor, I mean, that will never do. It seems

1 to me the moment you kick the prop out from under this  
2 it's simply a free floating mandate to fund speech, and it  
3 seems to me as such it can't possibly be sustained.

4 And I do think that even the word germane is  
5 awfully slippery, as is the word ideology. It seems to me  
6 that when you look at, for example, what Keller said about  
7 the Ellis case, it's really required in the whole Abood  
8 line of cases that something be reasonably necessary as an  
9 expense incurred to make the nonspeech program of  
10 collective bargaining or of professional regulation work.  
11 This is not reasonably necessary to make anything work  
12 except itself, and indeed one of their amici representing  
13 beef and milk and eggs I think said it quite bluntly I  
14 think on page 6 of the amicus brief. They said this  
15 speech is germane to itself.

16 QUESTION: Well, hurrah.

17 MR. TRIBE: It seems to me that tautology is  
18 everybody's friend except the friend of the First  
19 Amendment, and I think with that I would close.

20 QUESTION: Thank you, Mr. Tribe. Ms. McDowell,  
21 you have four minutes remaining.

22 REBUTTAL ARGUMENT OF BARBARA McDOWELL  
23 ON BEHALF OF THE PETITIONER

24 MS. McDOWELL: I did want to correct the  
25 suggestion that, as Mr. Tribe put it, the Secretary of

1 Agriculture does not have general censorial power over the  
2 speech of the Mushroom Council. Indeed, she does. It's  
3 inherent in 7 USC 6104(D)(3), no plan or project of  
4 promotion, research, consumer information or industry  
5 information or budget shall be implemented prior to its  
6 approval by the Secretary.

7 Indeed, I'm informed by the Department of  
8 Agriculture that secretaries of agriculture have censored  
9 speech of agricultural groups such as this one on grounds  
10 of taste as well as on grounds of lack of conformity with  
11 the statute and regulations.

12 Mr. Tribe referred to the theory that the  
13 Government should not be buttoning a person's lip or  
14 forcing them to speak. This program does neither for the  
15 reasons recognized in Wileman Brothers. Respondent is not  
16 required to engage in any speech nor is respondent's own  
17 speech censored in any manner by the Mushroom Act.

18 The mushroom producers such as respondent are  
19 merely required to contribute to an economic program to  
20 promote their product. Sometimes perhaps, as this Court  
21 has recognized, money can be speech, but here it's just  
22 money. Thank you.

23  
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1 CHIEF JUSTICE REHNQUIST: Thank you, Ms.  
2 McDowell, the case is submitted.

3 (Whereupon, at 11:06 a.m., the case in the  
4 above-entitled matter was submitted.)

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